IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HARVEY H. SEIPLE, JR., Plaintiff,	:	CIVIL ACTION
	:	NO. 97-CV-8107
v.	:	
COMMUNITY HOSPITAL OF LANCASTER and NORMAN AXELROD, DO, Defendants.	:	

M E M O R A N D U M

BUCKWALTER, J. April 14, 1998

Plaintiff, Harvey H. Seiple Jr. ("Seiple") claims that his termination from the Community Hospital of Lancaster violated the Americans with Disabilities Act ("ADA") and the Pennsylvania Human Relations Act ("PHRA"); constituted a breach of contract; a breach of covenant good faith and fair dealing; civil conspiracy and caused him severe emotional distress. Presently, before the court is a motion by Defendants, Community Hospital of Lancaster and Norman Axelrod, DO (individually "Community Hospital" and "Axelrod" and collectively "Community") for dismissal of counts III, IV, V, and VII of Seiple's complaint pursuant to federal rule of civil procedure 12(b)(6).[1] For the following reasons Community's motion is granted.

1. Community does not seek dismissal of Seiple's ADA and PHRA claims (counts I and II) or his claim against Axelrod for tortious interference with contract (count VI).

I. BACKGROUND

Seiple, a fifty-two year old male, board certified nurse anesthetist, was employed at Community Hospital for approximately eighteen years until March, 1996. During that time Seiple's direct supervisor was Dr. Daniel Wert ("Wert"). In 1992 Seiple became severely depressed and began receiving therapy and drug treatment. In 1995 Seiple's medication began to cause him severe drowsiness. Seiple discussed this problem with Wert and consequently his medication was altered to eliminate further side effects.

On February 28, 1996 Seiple assisted Axelrod in performing a hernia repair operation. Seiple was responsible for administering anesthesia. According to Seiple, midway through the operation, Axelrod asked him to have the patient cough so that he would come out of anesthesia. When Seiple did not respond Axelrod ordered "Chip, get awake or wake up, make the patient cough." Seiple followed Axelrod's orders and the operation was completed. No further discussion took place between Axelrod and Seiple. Seiple administered anesthesia for two more of Axelrod's operations later that day.

Nurse Glen Thomas ("Thomas") who was present during the hernia repair operation and Axelrod both reported to the Vice President of Patient Services, Kathy Williams ("Williams") that Seiple had been sleeping during the hernia operation. The

following day, February 29, 1996, Williams asked Seiple to meet with her and Vice President of Human Resources, Joseph Zanghi ("Zanghi"). Seiple refused on grounds that in accordance with hospital policy he was entitled to have Wert present at such a meeting. Thereafter, Williams and Zanghi suspended Seiple without pay until an investigation could be conducted. At a meeting held on March 6, 1996, attended by Seiple and his wife, Williams and Zanghi informed Seiple that he was fired. Seiple maintains that Axelrod's and Thomas' accusations that he was asleep while on duty were false and that Wert "Vehemently disagreed with the decision to terminate."

II. COMMUNITY'S 12(B)(6) MOTION

In considering a Rule 12(b)(6) motion, the court must accept as true all well pled facts and draw all reasonable inferences from those facts in the light most favorable to the non-moving party. Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990). A complaint should be dismissed if there is no doubt that plaintiff cannot prove a set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46, 78 (1957). Community contends that Seiple's pleadings do not support counts III, IV, V, and VII of his complaint.

A. Count III: Breach of Contract

In his complaint, Seiple alleges that Community Hospital maintained written practices and procedures regarding termination and these were not followed when he was fired, therefore, Community Hospital's actions constituted a breach of contract. In their motion to dismiss, Community argues that vague breach of contract claims based on "business procedures and practice" do not exist under Pennsylvania law. Thus, in his response Seiple elaborates. Seiple explains that his termination was contrary to hospital policy numbers H.R. 2.4.01 and H.R. 2.4.02, which he attaches as exhibits to his response.[2]

Policy number H.R. 2.4.01 outlines employee grievance procedures. It is clear from the complaint that employee grievance procedures are not at issue in the instant case, therefore H.R. 2.4.01 is inapplicable.

Policy number H.R. 2.4.02 describes a progressive disciplinary process utilized by the hospital for incidents of unsatisfactory or poor behavior by employees. The process,

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2. In considering a Rule 12(b)(6) motion, the court reviews allegations in the complaint, pertinent matters of public record, orders, items appearing in the record of the case and exhibits attached to the complaint. Chester County Intermediate Unit v. Pennsylvania Blue Shield, 896 F.2d 808, 812 (3d Cir. 1990). The court may also consider documents of undisputed authenticity provided with the motion to dismiss. PBGC v. White Consolidated Industries, Inc., 998 F.2d 1192, 1196 (3d Cir. 1993).

In addition to the hospital policies, which I consider as a matter of public record, Seiple attaches several affidavits. As these are not part of the record of the case, were not attached to the original complaint, and I decline to construe the instant motion as one for summary judgment rather than dismissal, the affidavits will not be considered in conjunction with Community's motion to dismiss. Fed. R. Civ. P. 12(b)(6) (advisory committee's note).

however, does not apply to employees terminated "for causes which may result in immediate discharge as specified in Policy 2.4.02 "Personal Conduct", or in any other Human Resource policy which may authorize a different procedure, ..." Thus, for purposes of the present motion only, I assume that Seiple was not terminated for cause and it is undisputed that the procedures prior to Seiple's termination were not followed.

It is well established in Pennsylvania that unless a corporate policy is offered as a binding term of employment, there can be no cause of action for violation of that policy. Muscarella v. Milton Shoe Mfg. Co., 507 A.2d 430, 432 (1986). "A company may indeed have a policy upon which they intend to act, given certain circumstances or events, but unless they communicate that policy as a part of a definite offer of employment they are free to change as events may require." Morosetti v. Louisiana Land and Exploration Co, Inc., 564 A.2d 151, 152052 (1989). Seiple has not alleged that adherence to policy number H.R. 2.4.02 was to be a binding term of his at-will employment, therefore, Seiple has failed to state a breach of contract claim. Accordingly, Count II is dismissed.

B. Count IV: Breach of Covenant of Good Faith and Fair Dealing

Seiple argues that by failing to adhere to its internal policies, Community Hospital breached its covenant of good faith

and fair dealing. Community argues that Pennsylvania does not recognize a requirement of good faith and fair dealing in at-will employment contracts. Community is correct. Pennsylvania does not recognize a claim for breach of covenant of good faith and fair dealing as an independent cause of action. McGrenaghan v. St. Denis School, 979 F.Supp. 323, 328 (E.D. Pa. 1997). While there may be an express or implied covenant of good faith and fair dealing in an employment contract, a breach of such covenant is a breach of contract action, not an independent action for a breach of a duty of good faith and fair dealing. Id. Accordingly, Count IV of Seiple's complaint is dismissed.

C. Count V: Intentional Infliction of Emotional Distress

Seiple claims that Thomas' and Axelrod's reports to Williams constituted an intentional infliction of emotional distress for which Seiple has "received medical care and treatment and suffered extreme depression, pronounced relapse and aggravation of disability, mental anguish embarrassment, shame humiliation, loss of reputation, loss of career and personal dignity." Community counters that such actions did not constitute extreme or outrageous behavior.

Pennsylvania law only allows recovery for intentional infliction of emotional distress in egregious cases involving conduct which is extreme, outrageous intentional or reckless and which causes severe emotional distress. Cox v. Keystone Carbon

Co., 861 F.2d 390, 395 (3d Cir. 1988). Consequently, as the court in Cox explained "it is extremely rare to find conduct in the employment context that will rise to the level of outrageousness necessary to provide a basis for recovery for the tort of intentional infliction of emotional distress." Id. In a hospital setting reporting that an employee responsible for administering anesthesia was sleeping during an operation, even if ultimately false, is expected rather than outrageous conduct. Consequently, based on the allegations before me, it is evident that Axelrod's and Thomas' conduct was within the bounds of decency. Thus, Seiple has failed to state a claim for intentional infliction of emotional distress. Furthermore, Pennsylvania's workers' compensation statute provides the sole remedy "for injuries allegedly sustained during the course of employment." 77 Pa. Stat. Ann. § 481(a)(1992 & Supp. 1997). The exclusivity provision of that statute bars claims for intentional infliction of emotional distress arising out of an employment relationship. See Matczak v. Frankford Candy and Chocolate Company, 136 F.3d 933, --, 1997 WL 786925, *7 (3d Cir. Dec 23, 1997). Therefore, even if viable, Seiple's intentional infliction of emotional distress claim would be barred.

D. Count VII: Civil Conspiracy

Finally, Community seeks dismissal of Count VII, Seiple's civil conspiracy claim. Seiple claims that Community

Hospital and Axelrod "acted in concert to deprive Plaintiff his statutory rights, to deprive Plaintiff his civil rights, to deprive Plaintiff his contractual rights, to cause Plaintiff emotional distress and to otherwise cause Plaintiff undue harm and suffering." (Complaint at ¶ 75).

To sustain a claim of civil conspiracy under Pennsylvania law, a plaintiff must prove that two or more persons intentionally combined to commit an unlawful act or to commit an otherwise lawful act by unlawful means. Skipworth by Williams v. Lead Industries Association, Inc., 690 A.2d 169, 174 (Pa. 1997). A claim for civil conspiracy can proceed only when there is a cause of action for an underlying act. Nix v. Temple University, 596 A.2d 1132, 1137 (Pa. Super. 1991). As I have dismissed counts III, IV and V insofar as Seiple relies on these claims to constitute underlying acts of the alleged conspiracy his conspiracy claim must be dismissed. What remains simply is Seiple's claim that defendants, Axelrod and Community Hospital, conspired to violate his rights under the ADA and the PHRA.

Community argues that Seiple's conspiracy to violate the PHRA claim is preempted by the PHRA.[3] I agree. The

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3. The exclusivity provision of the PHRA provides:

> "[A]s to acts declared unlawful by section five of this act [entitled "Unlawful Discriminatory Practices"] the procedures herein provided shall when invoked, be exclusive and the final determination therein shall exclude any other action, civil or criminal, based on the same grievance of the complainant concerned."

(continued...)

Pennsylvania Supreme Court has held that the PHRA provides a statutory remedy that precludes assertion of a common law tort action based on discrimination. Clay v. Advanced Computer Applications, Inc., 559 A.2d 917, 918 (Pa. 1989). Therefore, Seiple cannot maintain an independent common law claim of conspiracy when a key allegation of such claim is that defendants engaged in or conspired to engage in discriminatory conduct in violation of the PHRA. See id.; See also, Bennett v. Independence Blue Cross, 1993 WL 65812 * 2 (E.D.Pa. March 12, 1993).

Finally, the Supreme Court's decision in Great American Federal Savings & Loan Association v. Novotny, 442 U.S. 366 (1979), dictates dismissal of Seiple's conspiracy to violate the ADA claim. In Novotny, the Supreme Court expressly stated that no cause of action under 28 U.S.C. § 1985(3) exists for conspiracy to violate Title VII. Novotny, 442 U.S. 376. The Court noted that to hold otherwise would allow complainants to completely bypass the administrative process, which plays a crucial role in the scheme established by Congress in Title VII. Id. Numerous courts have applied this rational in dismissing claims of civil conspiracy to violate the ADEA. Bennett, 1993 WL 65812 * 2 (citations omitted). Likewise I find the rational of Novotny equally applicable to state law claims of conspiracy to

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3.(...continued)
43 Pa.Stat. Ann § 962(b) (1991 & Supp. 1997)

violate the ADA. See Lake v. Arnold, 112 F.3d 682, 688 n. 10 (3d Cir 1997)(acknowledging applicability of Novotny to claims of conspiracy to violate the ADA). Accordingly, Seiple's civil conspiracy claim is dismissed.

An appropriate order follows.

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O R D E R

AND NOW, this 14th day of April 1998, upon consideration of Defendants' motion for partial dismissal (Docket No. 4) and Plaintiff's response (Docket No. 5), it is hereby ordered that Defendants' motion is **GRANTED**. Accordingly Counts III, IV, V and VII of the complaint are dismissed.

BY THE COURT:

RONALD L. BUCKWALTER, J.